BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

RITA JUNE SOWERS Claimant	)	
VS.	)	
KINGMAN COMMUNITY HOSPITAL Respondent	)	Docket No. 1,065,624
AND	)	
KANSAS HOSPITAL ASSOC. WCF, INC. Insurance Carrier	)	

ORDER

Respondent and its insurance carrier (respondent) request review of the February 19, 2014, preliminary hearing Order entered by Administrative Law Judge (ALJ) John Clark. James Oswalt of Hutchinson, Kansas, appeared for claimant. M. Joan Klosterman of Kansas City, Missouri, appeared for respondent.

The ALJ found claimant injured her low back arising out of and in the course of her employment with respondent each and every working day through her last date of employment of April 29, 2013, and respondent had statutory notice of the injury. Further, the ALJ found the prevailing factor for claimant's present back problems is the work she performed for respondent through her last day worked. The ALJ determined claimant entitled to temporary total disability (TTD) compensation and authorized Dr. Dickerson as claimant's treating physician.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the November 5, 2013, Preliminary Hearing and the exhibits; and the transcript of the October 1, 2013, deposition of claimant, together with the pleadings contained in the administrative file.

ISSUES

Respondent argues claimant failed to meet her burden of proving she sustained an injury in the course and scope of her employment, as the only evidence available is contradictory. Additionally, respondent contends the ALJ erred in giving more weight to

the opinions of Drs. Victoria Moots and George Fluter than those of Dr. Douglas Burton, who determined claimant's preexisting condition is the prevailing factor in causing her injury, medical condition, and need for medical treatment. Moreover, respondent argues the opinions of Marleen Fairchild, PA-C, lack foundation because she is unqualified to make a determination. Therefore, respondent maintains claimant is not entitled to workers compensation benefits.

Claimant argues the ALJ's Order should be affirmed. Claimant contends she has satisfied her burden of proof and established by a preponderance of credible evidence her repetitive work activities at respondent caused a new injury resulting in a structural change to her back, and these activities were the prevailing factor causing this change.

The issues for the Board's review are:

1. Did claimant's injuries arise out of and in the course of her employment with respondent?

2. Were claimant's job activities the prevailing factor in causing her injury, medical condition, and need for medical treatment?

3. Did the ALJ err in relying upon the opinions of Drs. Moots and Fluter over those of Dr. Burton?

4. Is claimant entitled to TTD benefits and medical treatment?

FINDINGS OF FACT

Claimant began employment with respondent on March 17, 1996, as a cook's aide, a position she held for approximately two years. Claimant then transferred to a housekeeping position where she mopped floors, made beds, removed trash, carried heavy laundry bags, put away clean linens, cleaned patient rooms, and stripped and waxed floors. In the course of a work day, claimant would lift hazardous waste containers weighing approximately 40 pounds at least once per shift, and she would also lift approximately 10-15 laundry bags weighing at least 45-50 pounds each per shift. Claimant continued in this position until April 29, 2013, her last day worked at respondent.

When she was a young teenager, claimant injured her low back when she tripped and fell out of a stationary school bus onto concrete. This caused claimant to require an adjustment to her low back by Dr. Lester Donley, and several years passed before she recovered. Claimant stated she continued to have problems with her back following the

fall, with pain ranging from the middle to the low back. During her deposition, claimant testified, "I've had a lifetime of back problems."[1]

Claimant also testified at deposition:

Q. January, 2013 was when you first started having problems with your back?

A. (Witness shakes head.)

Q. Is that a yes for the record?

A. Yes.

Q. And prior to January of 2013, you never had any problems with your back?

A. I had some, but I really didn't report it.[2]

Claimant treated with chiropractor Dr. Bruce Veach on a regular basis from 2010 through 2012 for issues related to her neck, shoulders, and low back. Claimant explained she stopped treatment for a time when her husband fell ill.

Claimant resumed treatment of her back in the fall of 2012 with Dr. Moots at the Donley Clinic. Claimant testified she actually treats with Maureen Fairchild, the physician assistant, instead of Dr. Moots "because that's just the way it is."[3] Notes dated November 14, 2012, indicate claimant complained of long-standing neck and low back pain predating 2004. A CT scan of the lumbar spine taken November 15, 2012, revealed Grade 2 spondylolisthesis at L5-S1 with bilateral spondylolytic defects at the lumbosacral junction and advanced multi-level facet joint degenerative arthritis, "most significantly observed at the lower 2 lumbar disc levels . . . ."[4]

Claimant was referred by Dr. Moots to Dr. John Fan, a pain management physician, who provided three series of injections to claimant's lumbar spine from January to February 2013. Claimant testified she was experiencing pain through her hips and down into her legs in addition to her low back pain when she treated with Dr. Fan. Claimant testified at deposition:

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[1] Claimant's Depo. at 19-20.

[2] *Id*. at 16.

[3] *Id*. at 22.

[4] P.H. Trans., Cl. Ex. 1 at 12.

> Q. When did you first start experiencing the pain down your legs and in the hip area?
>
> A. I had some pain from the sciatic nerve down my leg back when I went to the chiropractor at different times, but he would seem to get it straightened out, and then it got to the point that it didn't get straightened out. It just wouldn't go away.
>
> Q. So you had had the pain down your legs and in your hips dating back until sometime in 2010; is that right?
>
> A. Uh-huh.
>
> Q. Is that a yes for the record?
>
> A. Yes. Off and on – not constant but off and on, but it got to where it was constant there.[5]

Claimant clarified her hip and leg pain became constant at the end of 2012 and at the time she treated with Dr. Fan. Claimant told Dr. Fan the injections did not provide relief, and he recommended claimant begin pain medication. Claimant indicated she did not want to take pain medication on a regular basis, and she testified Dr. Fan ultimately did not prescribe medication. Claimant did not return to Dr. Fan.

Claimant continued to treat with Dr. Moots. The results of an MRI taken March 20, 2013, were similar to those of the November 2012 CT scan. The impression was "mild spondylolisthesis of L4 on 5 and L5 on S1. Mild effacement of the spinal canal at L3-4 and L5-S1."[6] Dr. Moots' record dated March 26, 2013, noted claimant was to be referred to Dr. John Dickerson, a neurosurgeon.

On April 29, 2013, claimant submitted a note to Pamela Galt, a supervisor for housekeeping and laundry at respondent. The note, signed by Ms. Fairchild, stated:

> [Claimant] is scheduled to see Dr. Dickerson in Wichita for eval. of DJD of the spine. Work is causing increased pain & her pain meds cause drowsiness. She needs to be off work until after 05/10/13 when his evaluation of her condition is completed.[7]

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[5] Claimant's Depo. at 23-24.

[6] P.H. Trans., Cl. Ex. 1 at 13.

[7] *Id*. at 2.

Ms. Galt stated she was unaware, even after receiving the note, whether claimant's back problems were work-related. Claimant testified she had complained of her back pain to Ms. Galt since 2005. Claimant could not say when she first told Ms. Galt of her pain:

> Q. So you have no idea of the day when you reported an injury.
>
> A. No, because I would go in there and I would tell her – I would sit down and talk to her and I would tell her these things, and she just – she's the type of person that she didn't want to hear it. And Nancy Stucky [*sic*] was another one of those.[8]

Ms. Galt explained she would occasionally lessen claimant's workload if claimant had pain; however, she stated claimant never said the work activities were causing the pain. Ms. Galt further testified:

> Q. When she gave you the note on April 29th, did you ask her – you asked her if this was work related?
>
> A. You know, I really don't remember, but I asked [claimant] all the time if it was work related.
>
> Q. Okay. And what was her response?
>
> A. No, that she hurt herself a long time ago.[9]

Adhering to procedure, Ms. Galt submitted the note to Nancy Stuchy, respondent's Human Resources Officer. Ms. Stuchy met with claimant to complete various paperwork related to claimant's leave of absence. Ms. Stuchy testified she did not ask claimant if the injury was work-related, nor did claimant request to report a work-related injury at that time. Ms. Stuchy explained that although the note mentioned work increased claimant's pain, "I believed that, according to the note, it aggravated a preexisting condition, is what I assumed by that note."[10] Ms. Stuchy stated she was unaware claimant's condition was a workers compensation claim until she received a letter from claimant's counsel dated May 31, 2013.

Claimant agreed she did not request medical treatment nor did she report a work-related injury to respondent on April 29, 2013. Claimant testified at deposition she was "not really" aware she could request workers compensation paperwork from respondent.[11]

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[8] Claimant's Depo. at 49-50.

[9] P.H. Trans. at 56.

[10] *Id*. at 50.

[11] Claimant's Depo. at 52.

She acknowledged attending meetings on the subject but admitted she "really didn't understand that [she] could have asked for the paperwork."[12] Respondent's Employee Handbook states, "In all instances, the employee must report any injury, no matter how slight, which occurs while on the job."[13] The handbook further directs an injured employee to immediately report to a supervisor and complete an Employer's Report of Accident. Claimant signed an acknowledgment of her receipt and understanding of respondent's handbook on January 19, 2011.

Claimant later testified at preliminary hearing she was aware of the workers compensation filing process during her employment with respondent. Claimant had previously filed two accident reports in the course of her employment. In 2002, claimant reported she struck and injured her low back on a sink while at work, and she again reported an injury to her low back and neck while pulling on a bed at work in 2004.[14] Claimant testified employees were discouraged to file workers compensation claims. Both Ms. Galt and Ms. Stuchy disputed this testimony, stating respondent required the reporting of all injuries.

Claimant completed paperwork for Dr. Dickerson's office on April 5, 2013, prior to her first visit with him on May 9, 2013. On the paperwork, claimant indicated her reason for her visit was low back pain and indicated her injury was not work-related. Claimant testified she was not aware her back condition was or could be work-related until she received the April 29, 2013, note from Dr. Moots' office. Dr. Dickerson provided claimant with a work release on May 9, 2013, which claimant submitted to Ms. Stuchy.

Dr. Dickerson diagnosed claimant with "severe lumbar stenosis and neural foraminal stenosis at L5-S1 with neurogenic claudication with spondylolisthesis and bilateral L5 pars defects."[15] On June 26, 2013, Dr. Dickerson performed surgery on claimant's lumbar spine:

> Posterior lumbar interbody fusion at L5-S1 with allograft bone spacers, posterolateral fusion at L5-S1 using locally harvested autograft and crushed cancellous allograft bone, bilateral laminectomies at L5-S1, bilateral microdiscectomies at L5-S1, bilateral foraminotomies at L5-S1, bilateral Gill procedure at L5, and bilateral L5-S1 microdiscectomy.[16]

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[12] *Id*.

[13] P.H. Trans., Resp. Ex. 1 at 1.

[14] *See* P.H. Trans., Resp. Ex. 2 & Resp. Ex. 3.

[15] P.H. Trans., Cl. Ex. 5 at 7.

[16] *Id.* at 2.

An MRI of claimant's lumbar spine, also dated June 26, 2013, revealed "bipedicular fusion of L5-S1 with associated decompressive laminectomy," a "grade 1 anterolisthesis of L5 on S1," and a prosthetic disc replacement.[17] Claimant treated postoperatively with a back brace and physical therapy. X-rays of claimant's back dated July 29, 2013, revealed claimant's L5-S1 posterior lumbar interbody fusion was well aligned.

On October 22, 2013, claimant met with Dr. Fluter at her counsel's request for purposes of an IME. Claimant presented with complaints of constant low back and right lower extremity pain with numbness in both feet. After reviewing claimant's history, medical records, and performing a physical examination, Dr. Fluter assessed claimant with low back/right lower extremity pain; lumbosacral strain/sprain; lumbar discopathy at L5-S1; probable lower extremity radiculitis; status post lumbar spine surgery (posterior approach); probably sacroiliac joint dysfunction; and probable trochanteric bursitis. Dr. Fluter determined "there is a causal/contributory relationship between [claimant's] current condition and repetitive work-related activities."[18] Further, Dr. Fluter opined the prevailing factor for claimant's condition and need for medical treatment is the reported repetitive work-related activities. Dr. Fluter wrote, "No other prevailing factor is readily identifiable."[19]

Dr. Burton, an orthopedic surgeon, examined claimant at respondent's request on January 17, 2014. Claimant presented with back and bilateral leg pain. Dr. Burton reviewed claimant's history, medical records, and performed a physical examination, determining claimant suffered continued back and leg symptoms following her low back surgery. Dr. Burton opined:

> I have reviewed the pertinent records regarding the time of patient's alleged injury. I really do not see where there is any injury that has been documented to have initiated this. Clearly, her spondylolisthesis was pre-existing. Based upon this I do not believe that her work injury is the prevailing factor but that her pre-existing spondylolisthesis and spinal stenosis was the prevailing factor.[20]

Claimant has been on medical leave and not worked since April 29, 2013.

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[17] *Id*. at 10.

[18] Fluter IME (Oct. 22, 2013) at 6.

[19] *Id*.

[20] Burton Report (Jan. 17, 2014) at 2.

PRINCIPLES OF LAW

K.S.A. 2012 Supp. 44-508 states, in part:

(e) "Repetitive trauma" refers to cases where an injury occurs as a result of repetitive use, cumulative traumas or microtraumas. The repetitive nature of the injury must be demonstrated by diagnostic or clinical tests. The repetitive trauma must be the prevailing factor in causing the injury. "Repetitive trauma" shall in no case be construed to include occupational disease, as defined in K.S.A. 44-5a01, and amendments thereto.

In the case of injury by repetitive trauma, the date of injury shall be the earliest of:

(1) The date the employee, while employed for the employer against whom benefits are sought, is taken off work by a physician due to the diagnosed repetitive trauma;

(2) the date the employee, while employed for the employer against whom benefits are sought, is placed on modified or restricted duty by a physician due to the diagnosed repetitive trauma;

(3) the date the employee, while employed for the employer against whom benefits are sought, is advised by a physician that the condition is work-related; or

(4) the last day worked, if the employee no longer works for the employer against whom benefits are sought.

In no case shall the date of accident be later than the last date worked.

(f) (1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injuries may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

(A) An injury by repetitive trauma shall be deemed to arise out of employment only if:

(i) The employment exposed the worker to an increased risk or hazard which the worker would not have been exposed in normal non-employment life;

(ii) the increased risk or hazard to which the employment exposed the worker is the prevailing factor in causing the repetitive trauma; and

(iii) the repetitive trauma is the prevailing factor in causing both the medical condition and resulting disability or impairment.

(B) An injury by accident shall be deemed to arise out of employment only if:

(i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and

(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

(3)(A) The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include:

(i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;

(ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;

(iii) accident or injury which arose out of a risk personal to the worker; or

(iv) accident or injury which arose either directly or indirectly from idiopathic causes.

(g) "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

(h) "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

K.S.A. 2012 Supp. 44-501b states, in part:

(b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.

(c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[21] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2013 Supp. 44-551(l)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[22]

ANALYSIS

1. Did claimant's injuries arise out of and in the course of her employment with respondent?

Clamant alleges an injury resulting from repetitive trauma through April 29, 2013. K.S.A. 2012 Supp. 44-508(f) necessarily incorporates the prevailing factor issue into the evaluation of whether an injury arises out of and in the course of employment.

K.S.A. 2012 Supp. 44-508(f)(2) states, inter alia, an injury is not compensable solely because it aggravates, accelerates, or exacerbates a preexisting condition or renders a preexisting condition symptomatic. Claimant agreed she had a lifetime of back problems after she hurt her back in eighth grade. As far back as November 12, 2004, claimant was diagnosed with "spondylolisthesis at L5-S1 with facet joint arthritis and spurring with associated scoliosis concaved to the right . . . ."[23]

Dr. Fluter opined the prevailing factor is claimant's work activities with no other prevailing factor readily identifiable. He does not address claimant's long-standing preexisting low back problems. Dr. Fluter's understanding of claimant's preexisting condition seems to be limited to "episodes of minor back pain."[24] Dr. Fluter's statement is inconsistent with the medical history and prior x-ray showing spondylolisthesis and facet joint arthritis.

It is significant the report of an MRI taken at Kingman Community Hospital on March 21, 2013, states, "At L5-S1, associate[d] spondylolisthesis creates an apparent disc bulge. This creates mild spinal stenosis. There is moderate foraminal encroachment and lateral

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[21] K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, *rev. denied* 286 Kan. 1179 (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

[22] K.S.A. 2013 Supp. 44-555c(j).

[23] P.H. Trans., Resp. Ex. 6 at 128.

[24] Fluter IME (Oct. 22, 2013) at 1.

recess narrowing bilaterally."[25] The spondylolisthesis found in 2013 was at the same level found in 2004. Dr. Fluter did not comment on the preexisting spondylolisthesis.

Dr. Burton acknowledged the preexisting spondylolisthesis and wrote "her pre-existing spondylolisthesis and spinal stenosis was the prevailing factor."[26] The undersigned finds this opinion more persuasive. Based upon the available medical evidence, claimant has failed to meet the burden of showing she suffered an injury by repetitive trauma arising out of and in the course of her employment with respondent.

All other issues are moot.

CONCLUSION

This Board Member finds claimant failed to prove she suffered an injury by repetitive trauma arising out of and in the course of employment, and claimant's job activities were not the prevailing factor in causing her injury, medical condition, and her need for medical treatment.

WHEREFORE, the undersigned Board Member finds that the February 19, 2014, preliminary hearing Order entered by ALJ John Clark is reversed.

IT IS SO ORDERED.

Dated this _____ day of May 2014.

_____
HONORABLE SETH G. VALERIUS
BOARD MEMBER

c: James Oswalt, Attorney for Claimant
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Honorable John Clark, Administrative Law Judge

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[25] P.H. Trans., Resp. Ex. 4 at 46.

[26] Burton Report (Jan. 17, 2014) at 2.